No. 8662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MARGARET D. KLEINSCHMIDT, as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bankruptcy of the Estate of B. F. Baum, a Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

SUMMARY OF THE ARGUMENT.

I. Baum forfeited his interest in the Camp Rock Placer Mine prior to any conveyance and prior to his adjudication in bankruptcy.

(a) Appellee neither refutes nor refers to the forfeiture of Baum's interest in the property.

(b) Whether appellee complains of the quitclaim deed after Baum's adjudication or the assignment before adjudication, he complains of the conveyance of a dry legal title, as Baum had no interest in the property.

II. The conduct of Baum and Kleinschmidt as shown by the evidence, including the evidence pointed out in appellee's brief, is consistent only with appellant's contention that Baum had no interest in Camp Rock Placer Mine after September 15, 1931.

(a) Baum's "admissions against interest" are, first, not binding on appellant and, second, refute appellee's claim of a fraudulent conveyance.

(b) There is no evidence that Baum's equitable interest in the property, which interest appellant contends he forfeited, ever exceeded $1,666.65, the total of his contribution toward the purchase price.

(c) Mere omissions and carelessness in the dealings between the parties do not establish concealment, deceit or dishonesty.

ARGUMENT.

I. BAUM FORFEITED HIS INTEREST IN THE CAMP ROCK PLACER MINE PRIOR TO ANY CONVEYANCE AND PRIOR TO HIS ADJUDICATION IN BANKRUPTCY.

(a) Appellee neither refutes nor refers to the forfeiture of Baum's interest in the property.

In appellee's statement of the case he says (Br. for Appellee, p. 4):

> "The trial court found that the bankrupt, at the date of his bankruptcy, was an owner of an interest in the property known as the Camp Rock Mine * * *."

This is the finding which we strenuously contend is unsupported by any evidence and contradictory to the un-

disputed evidence. Appellee points to no evidence in the record supporting the finding. He assumes the correctness of the finding and proceeds with an argument based upon that premise.

Nowhere in either the statement of the case or his argument does appellee refute or refer to the evidence that the bankrupt forfeited his interest in the mine almost two months before his adjudication in bankruptcy. More than half of appellant's argument in her opening brief is devoted to a consideration of the evidence and law on this point (Br. for Appellant, pp. 11-25). Appellee does not refer to it.

The facts as stated in appellant's opening brief (pp. 4-11) are undisputed. It is not disputed that the contract between Sullivan, Kleinschmidt and Baum, the only suggested source of any interest Baum had in the mine, provided that if Baum or any of the other parties failed to supply his portion of the required funds his interest in the mine would be forfeited (Tr., p. 85; Br. for Appellant, p. 5). It is not disputed that Baum failed to supply his portion of the required funds on September 15, 1931 (Tr., pp. 99, 133-134, 147, 149, 152; Br. for Appellant, p. 6), and contributed nothing toward the venture thereafter. Nor does appellee question the settled law as stated in *Martin v. Burris,* 57 Cal. App. 739, 208 Pac. 174 (Br. for Appellant, pp. 16, 17), that under these facts Baum forfeited his interest in the property.

The only important question in this case is, did Baum forfeit his interest in the mine by failing to supply his proportionate share of the required funds on September

15, 1931? Answer this question in the affirmative, as it must be answered upon the record before the court and under the law cited and quoted in appellant's opening brief, and appellee's argument fails.

(b) Whether appellee complains of the quitclaim deed after Baum's adjudication or the assignment before adjudication, he complains of the conveyance of a dry legal title, as Baum had no interest in the property.

Appellee, under part I of his argument (Br. for Appellee, p. 7) states that he pleaded and he now contends the conveyance of which he complains was the deeding of the property by the bankrupt subsequent to his adjudication. In relying upon this conveyance, the appellee not only ignores the evidence of forfeiture which appellant discussed in her opening brief, but Baum's assignment of his interest in the mine on September 23, 1931 (Tr., pp. 94-96), prior to his adjudication. If there was either a forfeiture or a valid assignment, the deed complained of by appellee could do no more than clear the legal title. It is appellant's contention that the evidence clearly shows that neither the assignment nor the quitclaim deed of which appellant complains conveyed more than a dry legal title.

On the undisputed facts under the law Baum forfeited any interest he had in the Camp Rock Placer Mine on September 15, 1931. The assignment of his interest given by Baum to Kleinschmidt before his adjudication was executed and delivered eight days after the forfeiture, on September 23, 1931, and was, under the circumstances, no more than evidence of the forfeiture. The quitclaim deed given by Baum to Kleinschmidt was acknowledged

and executed on April 7, 1932, and was prepared by Kleinschmidt's attorney for the purpose of clearing the legal title and because he thought the assignment ambiguous (Tr., p. 134; Br. for Appellant, p. 21). Both instruments were executed and delivered after Baum had forfeited any beneficial or equitable interest he had in the property. Neither instrument could convey any more than the dry legal title. Such a conveyance is not one of which the plaintiff in this action can complain.

Schreyer v. Scott, 134 U. S. 405;
Martin v. Thomas, 74 Or. 206, 144 Pac. 684;
Williams v. Levy (9th C.C.A.), 54 F. (2d) 18;
27 *Corpus Juris,* pp. 433, 444.

Appellee's contention that there can be no bona fide holder of a bankrupt's property after adjudication (Br. for Appellee, part II, pp. 9-11) is not questioned by appellant. Appellant makes no claim that she is or that Kleinschmidt was a transferee of the bankrupt's property after adjudication, bona fide or otherwise. Appellee's application to this case of the legal proposition stated in part II of his argument is based upon an erroneous premise and an assumption supported by neither evidence nor inference, and in fact, not even explained by argument. At page 10 in his brief appellee says:

> "In the instant case the bankrupt Baum being adjudicated a bankrupt, forthwith on November 6, 1931, the title to all of his property became *custodia legis.*"

Appellant does not deny this proposition but there is no evidence whatever that any part of Camp Rock Placer Mine was the property of the bankrupt on November 6,

1931. Baum had no interest in the mining property on this date and had not had any interest in it since September 15, 1931. Kleinschmidt, and Sullivan, who later forfeited his interest in the same manner as Baum had, were on November 6, 1931, the date of Baum's adjudication in bankruptcy, the sole equitable owners of Camp Rock Placer Mine under the purchase contract of April 16, 1931.

As the appellee says on page 18 of his brief, in this case "* * * the question of *bona fides* is immaterial." By all the evidence the property was Kleinschmidt's and Sullivan's, and after December 15, 1931, Kleinschmidt's alone, and Baum could not fraudulently convey what was not his.

II. THE CONDUCT OF BAUM AND KLEINSCHMIDT AS SHOWN BY THE EVIDENCE, INCLUDING THE EVIDENCE POINTED OUT IN APPELLEE'S BRIEF, IS CONSISTENT ONLY WITH APPELLANT'S CONTENTION THAT BAUM HAD NO INTEREST IN CAMP ROCK PLACER MINE AFTER SEPTEMBER 15, 1931.

(a) Baum's "admissions against interest" are, first, not binding on appellant and, second, refute appellee's claim of a fraudulent conveyance.

Under part III of appellee's argument, reference is made to so-called "admissions against interest" by Baum. Such admissions, if they have any evidentiary value, are not admissible against appellant (*Nishi v. Inoguchi,* 116 Cal. App. 398, 2 P. (2d) 864). But even if admissible, they could establish nothing. On page 13 of his brief appellee says:

> "As we shall show hereafter by the admission against interest of Baum, he had lost all of his property at the time he made the assignment in September just prior to his November bankruptcy."

To be specific, eight days before he made the assignment in September he had lost all his interest in the Camp Rock Placer Mine by his failure to perform his contract.

Appellee places some importance upon the "admissions against interest" of Baum that his schedules filed in bankruptcy did not disclose that he had any interest in the mining property. The schedules did not disclose that he had any interest in the mining property because he had no interest in the mining property on that date. Appellee's whole argument proceeds upon the erroneous premise that Baum had an interest in the property at the date of his adjudication in bankruptcy.

If these be admissions against Baum's interest it does not appear what Baum's interest may be. They confirm appellant's theory of the case and refute appellee's unsupported claim that Baum had an interest in the mine at the date of his adjudication in bankruptcy.

Whether Kleinschmidt knew or did not know of the bankruptcy proceeding, he was at all times after September 15, 1931, entitled to a deed from Baum to clear title to the property. As stated in appellant's opening brief (pp. 24, 25):

> "* * * if for any reason such assignment and quitclaim deed are invalid or insufficient, it is the legal duty of Baum and his trustee in bankruptcy to execute

> a good and sufficient deed to appellant under the agreement of April 24, 1931, and under the authorities * * *."

On page 14 of his brief appellee claims as evidence against interest the testimony that Baum "was exercising domain over the mining property in question by way of trying to make a sale of it * * *." The explanation of this is found in the quotation from the transcript on page 16 of appellee's brief, wherein Baum testified that he, at Kleinschmidt's request, acted as Kleinschmidt's agent in the sale of the mining property.

(b) There is no evidence that Baum's equitable interest in the property, which interest appellant contends he forfeited, ever exceeded $1,666.65, the total of his contribution toward the purchase price.

Appellee's argument under part V of his brief suffers from the defect which permeates other parts of his argument, and arises from the assumption of an erroneous premise at the outset.

Appellee says (Br. for Appellee, p. 19):

> "Benjamin Baum testified in this case that his interest in the Camp Rock mining properties was of no value as of November 6, 1931. With nothing being done at the mine other than assessment work, the interest of Baum became worth $25,000.00 within four days after his discharge in April of the next year, 1932. This is what the court was asked to believe."

It was the appellee, and not the appellant or the defendant Baum, who asked the court to believe that "the in-

terest of Baum became worth $25,000.00 within four days after his discharge.''

The discovery of a willing and able buyer of the mining property at that time established the value of the mine at $49,000. But the evidence is conclusive, and appellant has consistently contended, that Baum had no interest in the property at that time, nor had he had any interest since September, 1931. Although appellee alleged in his pleading that Baum had a $25,000 interest in the Camp Rock Placer Mine, no evidence was introduced at the trial to establish the source of that interest. Sullivan contributed $2,666.65, slightly more than 10 per cent of the purchase price of the mine, and got his money back when the mine was sold. Baum contributed $1,666.65 (Tr., p. 149), slightly more than 7½ per cent of the purchase price, and his trustee in bankruptcy would have the trial court, and now this court, believe that this contribution entitled him to a $25,000 interest in the mine. Appellant finds it, as apparently does appellee, unbelievable.

(c) Mere omissions and carelessness in the dealings between the parties do not establish concealment, deceit or dishonesty.

Under part IV of his argument appellee notes that Baum did not have a real estate broker's license. He would have us believe that Baum attempted to conceal valuable assets from the bankruptcy court, and yet would not overlook the requirement of the law that he obtain a license before participating in the sale of another's property. The appellant is not concerned with Baum's omission in this respect. It may explain Baum's action some-

what, however, to note that Baum began his efforts to sell the property as early as July in 1931, two months before the forfeiture occurred and while he still had an interest in the property.

In his brief (pp. 20, 21) appellee notes the failure of Mr. Blanche, counsel for Kleinschmidt during his lifetime, to secure the signature of Baum's wife on the quitclaim deed to Kleinschmidt of February 29, 1932. At the time of this deed the mine was by all the evidence admittedly Kleinschmidt's and Kleinschmidt's alone. He was in the position of the appellee in *Williams v. Levy,* supra (Br. for Appellant, pp. 23-24), wherein this court said:

> "* * * what possible difference could that fact [the authenticity of the deed from the bankrupt to the appellee] make in the determination of the right of appellee to have the lot, *which was by all the evidence admittedly his,* reserved to him?" (italics ours).

As the Supreme Court noted in *Schreyer v. Scott,* 134 U. S. 405, 416 (Br. for Appellant, pp. 32, 33), the very confusion and carelessness in the dealings between the parties "make against rather than in favor of the claim of fraud."

In spite of the alleged fraudulent motive which appellee would have the court infer from the conduct of Baum and Kleinschmidt, they neglected to take the step which would most obviously further their supposed sinister purpose. It is a step as obvious to appellee as it would have been to Baum and Kleinschmidt, if they

had had such a purpose, for he mistakenly accuses them of it in concluding his argument.

Appellee says in his brief (p. 24):

> "Obviously the bankrupt put his property located 200 miles from the forum of his creditors' meetings in the name of Kleinschmidt until a few days after his discharge * * *."

The fact is, as shown by the transcript of record, that although Baum forfeited his interest in September, 1931, a 33⅓ per cent interest in the Camp Rock Placer Mine stood in the name of Baum upon the public records from August 28, 1931, more than two months before his adjudication in bankruptcy, until September 15, 1932, more than eight months after his discharge (Tr., pp. 62-64, 67-69).

CONCLUSION.

The record before the court shows conclusively, without contradictory evidence, that Baum forfeited any interest he had in the Camp Rock Placer Mine before his adjudication in bankruptcy and before any of the alleged fraudulent conveyances. The finding of the trial court that Baum was the owner of an interest in the Camp Rock Placer Mine on the date of his adjudication in bankruptcy is without the support of any evidence. There is likewise no evidence to support the finding of the trial court that appellant's predecessor in interest received any of the bankrupt's property after his adjudication, nor is there evidence of fraud or a conspiracy of any kind.

It is respectfully submitted that the judgment and decree of the district court should be reversed by reason of the insufficiency of the evidence to support the findings.

Dated, San Francisco,
November 12, 1937.

Respectfully submitted,
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